

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Appeal No.311 of 2003

Date of decision :- 11-08-2005

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 11.08.2005

Initial of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No.311 of 2003

{Old No.2860 of 1980}

1.Ayyub alias Mahboob

2.Mustaqeem

Both S/o Shri Mushtaq

3.Kallo S/o Bundoo

All R/o village Dheer Mazra

P.S. Bhagwanpur

District Saharanpur

.....Appellants

Versus

State of Uttaranchal

.....Respondent

Date :- 11th August, 2005

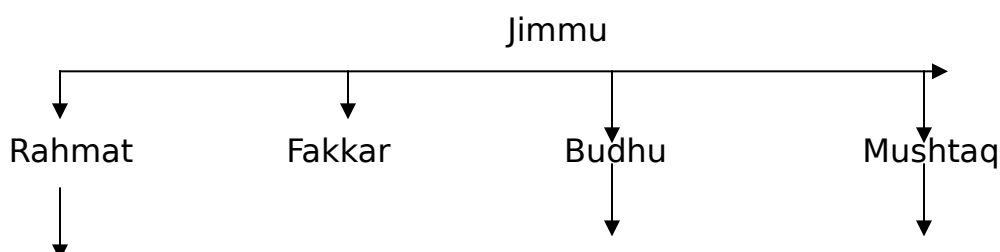
Mr. Siddartha Sah learned counsel for the appellants

Sri D. K. Sharma G.A. assisted by Sri Rajeev Mohan learned brief holder.

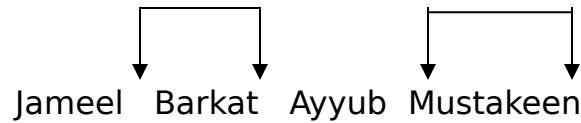
Hon'ble J.C.S. Rawat, J.

1. This is a criminal appeal against the judgment and order dated 18.11.1980 passed by Sri Vishnu Chandra, the then Vth Addl. Sessions Judge, Saharanpur in S.T. No.272/1980 State Vs. Ayyub & others convicting and sentencing the appellants to R.I. for two years under section 308 read with section 34 I.P.C. and to R.I. for one year under section 323 read with section 34 I.P.C. Both the sentences would run concurrently.

2. The prosecution case in a nutshell is that one-Jimmu has four sons namely Rahmat, Fakkar, Budhu and Mushtaq. Ramzani is the son of Rahmat. Budhu has tow sons namely Jameel-injured and Barkat-injured. Barkat has one daughter namely Km. Naeema. Mushtaq has two sons namely Ayyub-accused and accused-Mustaqeem. Ayyum and Mustkim are the cousins of Barkat Ali-complainant. For the sake of convenience, pedigree is given below:-



Ramzani(son)



3. After the death of Jimmu, his land was entered in the name of his four sons. There was consolidation in the village and one chak was formed in the name of Mustkim and Ayyum accused who are the sons of Mushtaq. The other chak was entered in the name of Rehmat, Fakkar and Budhu and this chak is about 48 bighas kachcha in area and is in the south of village. Fakker's wife died many years ago. Although, the chak in the name of Fakkar, Rehmat and Budhu was not legally partitioned, but each one was in possession of his respective share on the spot. It is alleged that about ten years ago Fakkar had executed an agreement for sale in respect of his share in favour of Barkat, Zamil and Ramzani and since then they had been in possession of it. Three months before the occurrence Mustkim had got a sale deed executed in respect of the land of Fakkar in his favour and on the basis of that he had applied for mutation for which Barkat and others had filed objections and there was a dispute about the land and the accused persons wanted to take forcible possession of it. In the disputed land Barkat had sown Munji sugarcane and Chari and on the alleged date, time and place of occurrence Barkat and his brother Zamil were weeding the Munji crop. Barkat's daughter Km. Naeema had gone to the field with the meals for Barkat and Zamil and she was also there at that time. It is alleged that at about 7 or

7:30PM accused Mustkim, Ayyum and Kalu accompanied with Fakkar armed with lathies came there and started beating Barkat and Zamil and Km. Naeema. On the hue and cry, Hamid, Saddiq and others reached there

who intervened and saved them. Zamil had received a lathi blow on his head and he had become unconscious on the spot. Barkat have also wielded lathi on the accused persons in self-defence. Zamil was taken to the village and from there Barkat took Zamil and Km. Naeema to the police station where he lodged a report at 8:45 AM. The injuries of Barkat and Km. Naeema and Zamil were medically examined by Dr. Madan Mohan, Medical Officer, P.H.C. Bhagwanpur the same day from 9:15 to 9:45AM. The investigation was entrusted to S.I. Jai Prakash Tyagi (PW-6), who prepared the site plan (Ex.ka.8) and recorded the statements of the prosecution witnesses. Later part of the investigation was done by S.I. Brijpal Sharma who submitted the chargesheet. The investigation was taken up as usual which culminated into the submission of the chargesheet. Accused Fakkar had not been committed to the court of Sessions as he was not available and, therefore, his case was separated from the present appellants-accused.

4. Charge was framed against the accused-appellants. The appellants denied the charges and claimed the trial. They have a cross-version. According to the defence version, 'marpeet' had taken place in the courtyard of Ayyum @ Mahboob when he was washing his feet on his hand pump. Barkat gave a lathi blow on his leg while Zamil grappled him and Janni gave him a lathi blow, and he fell down on the ground. Thereafter, Rehmat Pahalwan gave lathi blow Which fell on the head of Zamil as Zamil was over him at that time. The report about this occurrence was made by Ayyub the same day at police station at 12:15.

5. The prosecution in support of its case examined six witnesses. Barkat Ali (PW-1), Zamil (PW-2) and Hamid (PW-3) are the eye-witnesses of the incident and they supported the prosecution case. Other witnesses are Dr. Madan Mohan (PW-4), Constable Ram Prakash (PW-5) and S.I. Jai Prakash Tyagi (PW6).

6. In the statement recorded u/s 313 Cr.P.C. the appellants denied the prosecution case and stated that they have been falsely implicated in this case.

7. The learned trial court after appraisal of the evidence on record found the appellants guilty u/s 308/34 IPC & 323/34 I.P.C. and convicted and sentenced the appellants as mentioned above.

8. I have heard the learned counsel for the parties and perused the evidence on record.

9. I have noticed that there is dispute between the parties with regard to the land. It is also not disputed that the incident took place at the disputed land. Barkat Ali (PW-1), Zamil (PW-2) and Hamid (PW-3) are the eye-witnesses of the incident and they supported the prosecution case. Hamid (PW-3) is the independent witness of the incident. He has stated in his evidence that he is in the field of Raffiq at the time of incident. On the hue and cry, he reached at the spot and seen the injured-Zamil lying on the ground in unconscious stage and the appellants were standing near the place of incident. All the appellants were armed with lathies. As soon as the witnesses reached at the spot the appellants fled away form the place of incident. Dr. Madan Mohan (PW-4) examined the injured persons and proved the injury report. The

following injuries were found on the person of injured-Zamil:-

Lacerated wound 4 cm x 1.2 cm x scalp deep on Rt. Side head about 10.5cm above from the right ear. Injuries kept u.o. Adv. X-ray skull 1. A.P. & 2. Lateral

View:- Pupil Lt. Eye dilated Rt. Eye castride & reaction to light is sluggish

Pt. is semi conscious? G.C. is poor Pt. Referred to S.B.D. hospital SPR for x-ray & advice accordingly.

Injury is kept u.o. adv. X-ray skull A.P. & lateral view Pt. referred to S.B.D. Hospital SPR

Injury is caused by some blunt object. Duration fresh.

The following injuries were found on the person of injured-Barkat:-

- (i) Abrasion 5cm x 1cm on Rt. Side neck lower part in front exceeding to chest wall.
- (ii) Abrasion 0.5cm x 0.25cm on left dorsa of head.
- (iii) Complaint of pain of Rt. Lower par of chest. Injuries kept u.o. Adv. X-ray chest P.A. view to rule and fractured of rib underneath. No ext. mark of injury is seen.

Opinion: Injury No.1 & 2 are caused by friction with some rough surface. Injury No.2 is kept u.o. Adv. X-ray chest P.A. view to rule out fraction of lower chest ribes. Ref. To S.B.D. hospital SRP for X-ray. Injury No.1 & 2 are simple in nature.

10. The learned counsel for the appellant contended that PW-3 Hamid had enmity with the appellants and as such his evidence cannot be relied upon. The learned G.A. refuted the contention and contended that PW-3 has stated as follows:-

*^ ^ esjs Åij lq[kyky dh ?kjokyh dks idM+us o
NsM+us dk eqdnek pyk Fkk ftlesa uhps dh
vnkyr esa ltk gqbZ o vihy esa cjh gks x;k Fkk ;g
dgk xyr gS gS fd v;~;wc us mlesa esajs f[kykQ
xokg FkkA ;g vkSjr NsM+h okyh ?kVuk ge okys
ls 15 lky igys dh gSA ;g dguk xyr gS fd ;g vkSjr
dh NsM+h okyh ckr bl ?kVuk ls 2&3 lky igys dh
Fkh vkSj mlh jaft'k dh otg ls >wBh xokgh ns jgk
gwW*

11. The above statement of PW-3 does not reveal that he has admitted any enmity with the appellant. As such, the contention is not tenable. It is also pertinent to mention here that the appellants have also lodged the FIR against the complainant party stating therein that the 'marpeet' took place in the courtyard of Ayyub @ Mahboob when he was washing his feet on his hand pump. Barkat gave a lathi blow on his leg while Zamil grappled him and Janni gave him a lathi blow, and he fell down on the ground. Thereafter, Rehmat Pahalwan gave a lathi blow which fell on the head of Zamil as Zamil was over him at that time. The report about this occurrence was made by Ayyub the same day at police station at 12:15PM. The appellant had admitted that

Hamid-PW3 had seen the occurrence. These facts further reveals that the witness was at the spot. It is also an admitted that the cross case was ended in the acquittal of the complainant party and the evidence of

PW3-Hamid is cogent and credible on the point that he was present at the time of incident.

12. The learned counsel for the appellants contended that PW-3 has stated in his evidence that he has not seen the 'marpeet' and later on he has stated that he saw the 'marpeet' from his house. During the cross-examination, he has stated that he saw the lathies in the hands of the appellants. Therefore, his statement is not reliable. The learned G.A. refuted the contention. It is clear from the evidence when he reached at the spot and the injured had sustained the injuries. When a witness appears before the court, sometimes he may not stand the test of cross examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. Therefore, the evidence of PW-3 is cogent and credible.

13. The learned counsel for the appellants further contended that there are major contradictions in the testimony of the witnesses. As such, the appellants should be acquitted on this point alone. I have gone through the discrepancies as pointed out by the learned counsel for the appellants. The learned G.A. contended that these are the minor contradictions. The court has to remove chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this

protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicious are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free.

14. If the contradictions are there it do not affect the prosecution story. The courts should not take into account such discrepancies, which are bound to come on the testimonies. The discrepancies as pointed out by the learned counsel for the appellants are not of such consequences, which can be named as boulders. The Court is within its jurisdiction being the first appellate court to reappraise the evidence, but he discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the

evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. It has also been held that the Court should have to bear in mind that different witnesses react differently under different situations. **{See Leela Ram Vs. State of Haryana 2000 SCC (Cri) p/222}.**

15. The learned counsel for the appellants contended that the accused has been punished with the help of section 34 I.P.C. It was submitted by the learned counsel for the appellants that there is no allegation against the appellants they have committed the crime with a pre-concerned mind. It was further submitted that considering the age of the appellants the section 34 I.P.C. is not justified. Section 34 I.P.C. recognizes the principal of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. The section gives statutory recognition to the common-sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such pre-concerned or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on formed previously or in the course of occurrence and on the spur of the moment. The existence of a common Intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

16. In the instant case, the appellants came armed with 'Lathi' at the spot and thereafter they caused the injuries to the complainant by 'Lathi' blows. When the witnesses reached at the spot they fled together. To attract Section 34 I.P.C. it is not necessary that each one of the accused must assault the injured. It is

enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate act, similar or diverse. Therefore, there is no doubt that all the appellants, who came at the spot, had a common intention to commit the crime. Thus, there is no weight in the contention of the learned counsel for the appellants.

17. The learned counsel for the appellants further contended that Zameel has sustained lacerated wound on his head. Such type of injuries cannot be caused by the blow of 'Lathi'. The learned G.A. refuted the contention and contented that if the 'Lathi' is wielded forcibly the lacerated wound is possible on the person of injured. The prosecution has adduced the evidence of Dr. Madan Mohan (PW-4), who has stated in his evidence that injury No.1 i.e. lacerated wound can be caused by blow of an object and it may be caused by 'Lathi'. It is well settled that if the blow of 'Lathi' is caused by force, there will be a lacerated wound on the person of the injured. As such, the contention of the learned counsel for the appellants is not tenable.

18. The learned counsel for the appellants contended that the appellants would have the agricultural tools at the time of incident and how the 'Lathi' came at the spot. The learned G.A. refuted the contention. The prosecution has proved that the 'Lathi' was there at the time of incident and the defence has not challenged this fact. This fact is unrebutted. The prosecution has proved that there was 'Lathi', but there is no cross-examination or any fact which disbelieves this fact.

19. In the defence version, it is the case of the appellants that they have lodged a cross FIR in this

regard. The incident of 'Marpeet' took place in the courtyard of Ayyub @ Mahboob when he was washing his feet on his hand pump. Barkat gave a lathi blow on his leg while Zamil grappled him and Janni gave him a lathi blow, and he fell down on the ground. Thereafter, Rehmat Pahalwan gave a lathi blow which fell on the head of Zamil as Zamil was over him at that time. The injuries sustained by Ayyub @ Mahboob were examined by Dr. Madan Mohan (PW4), who has stated that all the injuries were simple and light in nature. It is also pertinent to mention here that the defence has taken a plea that the marpeet took place between the parties on account of killing of three hens. No suggestion has been made to the prosecution witnesses. As such, this theory is improbable. It is also admitted that the cross case was ended in the acquittal of the complainant party and no appeal has been preferred against that judgment. It is pertinent to mention here that the cross case was registered at about 12:15PM and the FIR of the complainant was lodged immediately after the incident. Keeping in view of the above

circumstances, I am of the view that the cross versions given by the defence is not believable.

20. PW-1 and PW-2 are the injured witnesses and their presence is proved at the place of incident. The defence made a lengthy cross-examination, but nothing could be elicited from the testimony of the witnesses. The oral testimony is corroborated by the prompt FIR. The incident took place at about 7 to 7:30AM and the FIR was lodged at about 8:45AM on the same day. The prompt FIR thus inspires confidence. There was prompt FIR and there was no chance of any manipulation in the FIR. As such, the prosecution has proved its case beyond reasonable doubt.

21. The learned counsel for the appellants further contended that the prosecution has not produced the other witnesses of the incident. The learned G.A. refuted the contention. It is natural that when incident took place many people would have come at the scene of occurrence. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. It is to be seen that the evidence available on record is otherwise satisfactorily in nature and can be said to be trustworthy and increase in the number of witnesses cannot be turned up as the requirement of the case. The witnesses if they are participating in that even their evidence cannot be thrown out rightly on the ground that the other witnesses have not been produced. If the witnesses are trustworthy then it is not required that there should be a multiplicity of evidence. Thus, the contention of the learned counsel for the appellants has not force. Moreover, the medical evidence also corroborates the factum of incident.

22. The learned counsel for the appellants further contended that there is a defect in the charge. The place of incident has been shown in the jungle and as a matter of fact the incident took place in the field of the parties. As such, the entire prosecution vitiates on the ground of defective charge. The learned G.A. refuted the contention and contended that this point was not raised before the court below as well as in the grounds of appeal. The learned counsel for the defence has not pointed out in the grounds of appeal as to what prejudice was caused to them. Section 464 Cr.P.C. clearly provides as under:-

“464. Effect of omission to frame, or absence of, or error in, charge (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.”

23. In the instant case, it is common parlance that a person describe the land as filed and another person describe the same as jungle. The prosecution has led the evidence that the incident took place in the filed. When the evidence was taken and the statements were recorded the appellants were aware about the fact that the prosecution evidence is with regard to the field. They have not made any cross-examination on this

point. As such, no prejudice has been caused to them. I am fortified with the view taken by the Hon'ble Supreme Court in **Willie (William) Slaney Vs. State of M.P. AIR 1956 SC p/116.**

24. The learned counsel for the appellants has pointed out that the medical officer has not stated that the injuries sustained by the injured were fatal for life. Perusal of the medical report reveals that the injury no.1 of Zameel was on the vital part and other injuries are simple. The medical officer was not cross-examined and his statement is unrebutted. The injury has been caused on the vital part and it is a lacerated wound. In view of the above, there is prima facie case that the appellants are guilty for the offence punishable under section 308 I.P.C. and 308/34 I.P.C.

25. The pedigree shows that the parties are related to each other. All the appellants are also related to the complainant as well as to the injured. It was pointed out that the appellants are related to the injured witnesses and if they are sent to the jail after a long period that will only add the fuel to the fire to their enmity and further submitted that if a lenient view of fine instead of imprisonment is taken by the court, it may act as cementing factor to the strain in their relations. The ends of justice will be satisfied if suitable modification in the sentence is made in this case.

26. The learned counsel for the appellants relied upon the decision of the Hon'ble Apex Court in **Nakchhed Vs. State of U.P. 1998 SCC (Cri) p/603**, in which it has been held that the victim of the crime was a

nephew of the appellant and during the period of appeal all the wounds of the parties had healed up. The Hon'ble Apex Court further held that no purpose would be served in sending the appellant to jail at that stage and sentence was reduced to the period already undergone. Considering the age of the appellants, the nature of offence and the circumstances of the case, I am of view that ends of justice will be met if the sentence is further modified and reduced to one year under section 308/34 I.P.C. instead of two years and the sentence under section 323 /34 I.P.C. is reduced to six months.

27. The appeal is partly allowed. Conviction of the appellants under section 308/34 I.P.C. and section 323/34 I.P.C. is affirmed. The sentence is reduced to one year under section 308/34 I.P.C. and the sentence

under section 323/34 I.P.C. is also reduced to six months. Both the sentences shall run concurrently.

28. Let the record be sent back to the court concerned for compliance and report to be submitted within two months.

(J.C.S. Rawat, J.)

Dated 11.8.2005
LSR

